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I—The Supreme Court of North Carolina erred in denying petitioners, all Negroes, the equal protection and due process of law guaranteed by the Fourteenth Amendment of the Constitution of the United States, and laws thereunder, by affirming their conviction upon warrants tried by a petit jury composed exclusively of white persons, from which juries, both grand and petit, an overwhelming majority of the qualified Negroes namely from 90 to 95% have for over a period of 10 years been arbitrarily, designfully and systematically discriminated against and excluded from jury selection service solely on account of race or color, by the Board of Commissioners of Forsyth County, North Carolina 5

A. Petitioners were arrested and convicted under warrants sworn out in the Municipal Court of Winston-Salem, N. C. and from the judgments there imposed in Oct.-Nov. 1946, appeals were taken to the Superior Court of Forsyth County, where they were tried de novo upon the original warrants before a petit jury, with Judge J. A. Rousseau presiding. Upon the call of the cases for trial petitioners immediately filed Motion to Quash, etc. (R. p. 4) alleging that at the time of trial, and at the then present term of court, and for a long period of time, viz, 10 years, and longer, immediately prior thereto, Negroes have been arbitrarily, designfully and systematically discriminated against and excluded from jury service in Forsyth County (both grand and petit) solely because of race or color, in violation of the due process and equal protection clauses of the 14th Amendment to the Constitution of the United States 6

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In the Supreme Court of the United States

OCTOBER TERM, 1947

No. 292 JOHN HENRY BRUNSON, *Petitioner,*
vs.
STATE OF NORTH CAROLINA,
Respondent.

No. 293 ESSIE KING, *Petitioner,*
vs.
STATE OF NORTH CAROLINA,
Respondent.

No. 294 MARTHA JONES, *Petitioner,*
vs.
STATE OF NORTH CAROLINA,
Respondent.

No. 295 LOUISE JAMES (Alias Moore),
and EVELYN CHILDS, *Petitioners,*
vs.
STATE OF NORTH CAROLINA,
Respondent.

No. 296 LIDA MAE WATKINS,
CELIA ANN PURCELL,
JAMES EDWARD STURDIVANT, and
LOUVENIA WALLACE, *Petitioners,*
vs.
STATE OF NORTH CAROLINA,
Respondent.

On Writ of Certiorari to the Supreme Court of the State of North Carolina

BRIEF FOR PETITIONERS

OPINIONS OF THE COURT BELOW

The per curiam opinions of the Supreme Court of North Carolina in all of these five (5) cases have been

reported officially, as follows: State vs. John Henry Brunson, 227 N. C. 558; State vs. Essie King, 227 N. C. 559; State vs. Martha Jones, 227 N. C. 561; State vs. Louise James (Alias Moore) and Evelyn Childs, 227 N. C. 558; State vs. Lida Mae Watkins, Celia Ann Purcell, James Edward Sturdivant, and Louvenia Wallace, 227 N. C. 560.

The opinion of the Supreme Court of North Carolina in State vs. Koritz Etal. is also reported officially in 227 N. C. 552 and this case is decisive of and becomes the opinion of the Supreme Court of North Carolina in each and all of these five (5) cases of petitioners.

JURISDICTION

The jurisdiction of this Court is involved and conferred under Section 237 (b) of the Judicial Code (U. S. Code, Title 28, Sec. 344 (b). The Supreme Court of North Carolina entered judgments in all of these five cases on June 5, 1947, and Petitions for Writs of Certiorari were filed in all of these five cases on Aug. 23, 1947 and they were granted on Dec. 15, 1947.

STATEMENT OF CASE

By Stipulation filed in this Court on Dec. 20, 1947, the parties hereto have agreed that since all of these five (5) cases have identically the same Motions to Quash, with evidence offered thereon, and the same Findings of Fact, Exceptions taken, and Assignments of Error entered, with the same questions of law raised and presented, that one record only, namely that in the *Brunson Case* No. 292, shall be printed and that this record may be used and considered by the Court in hearing and deciding all five cases. It was further stipulated that all five of

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these cases may be treated, considered, and briefed in one brief.

From the heat engendered by picket line controversies in a laundry workers strike and labor dispute in Winston-Salem, North Carolina, arose the arrest of all of the petitioners (Negroes) in these five (5) cases, in Oct.-Nov. 1946 under warrants sworn out in the Municipal Court of Winston-Salem and charging the following crimes;

(1) John Henry Brunson, assault on Christine Davis, a female,

(2) Essie King, disturbing the peace and disorderly conduct,

(3) Martha Jones, disturbing the peace and disorderly conduct,

(4) Louise James, (Alias Moore), malicious injury to real property,

(5) Evelyn Childs, malicious injury to real property,

(6) Lida Mae Watkins, four warrants;

- (A) Assault with deadly weapon, stick, on Ethel Crews,
- (B) Assault with a deadly weapon, stick on G. W. Lancaster,
- (C) Resisting officers while in the discharge of their duties,
- (D) Assault with a deadly weapon, stick, on R. F. Holcomb.

(7) Celia Ann Purcell, assault with a deadly weapon, stick, on Estelle Britt,

(8) James Edward Sturdivant, assault on Estelle Britt, a female,

(9) Louvenia Wallace, assault on Estelle Britt.

All of the petitioners were adjudged guilty in the Municipal Court of the offenses charged (no jury being provided for in the creation and set-up of said Court) and from the road and jail sentences imposed all appealed to the November Term 1946 of the Superior Court of Forsyth County where and when, upon the call of these five (5) cases for trial, de novo, (and before any petit jurors had been called up, sworn, or examined, relative to serving on these cases), each and all petitioners immediately filed their Motion to Quash the warrant and to discharge the petit jury panel on the grounds that the Board of County Commissioners of Forsyth County had arbitrarily, designfully, and systematically discriminated against and excluded Negroes from the grand and petit juries in said County for the past ten years and longer, and that the General Statutes of North Carolina requiring, as prerequisite qualifications for jury service, that all persons shall be tax-listers and tax-payers or freeholders, violate and run counter to the Fourteenth Amendment of the Constitution of the United States. His Honor J. A. Rousseau, Judge Presiding, after hearing evidence thereon overruled all of petitioner's Motions to Quash (R. p 4) and made his Findings of Fact (R. p. 31), to which denial of Motion to Quash, and the Findings of Fact, petitioners duly excepted thereto. The Court then ordered the trials proceeded with on their merits, evidence was offered by the State, and verdicts of guilty, as charged in the warrants, were rendered by the petit jury against all of the petitioners. From the Judgement entered against John Henry Brunson (R. p 32) sentencing him to 15 months on the roads, and from the denial of motion for a new trial on the grounds of error committed during the progress of the trial, (R. p 32) he duly excepted and gave notice of appeal to the State Supreme Court in open Court. Judgments were also entered

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against each and all of the petitioners in the other four cases, as follows; Essie King, 30 days in County jail; Martha Jones, 30 days in County jail; Louise James (Alias Moore), 6 months in County jail; Evelyn Childs, 6 months in County jail; Lida Mae Watkins, 51 months in County jail; Celia Ann Purcell, 12 months in County jail; James Edward Sturdivant, 12 months on the roads; and Louvenia Wallace, 30 days in County jail. From the Judgments entered against the petitioners in these other four cases, as well as from the denial of motion for a new trial on the grounds of error committed during the progress of the trial, all petitioners duly excepted and likewise gave notice of appeal to the State Supreme Court, in open court. Upon appeal, the Supreme Court of North Carolina, affirmed the judgments.

ERRORS RELIED UPON

I

The Supreme Court of North Carolina erred in denying petitioners, all Negroes, the equal protection and due process of law guaranteed by the Fourteenth Amendment of the Constitution of the United States, and laws thereunder, by affirming their conviction upon warrants tried by a petit jury composed exclusively of white persons, from which juries, both grand and petit, an overwhelming majority of the qualified Negroes, namely from 90% to 95%, have for over a period of 10 years been arbitrarily, designfully and systematically discriminated against and excluded from jury selection service solely on account of race or color, by the Board of Commissioners of Forsyth County, North Carolina.

A. PETITIONERS WERE ARRESTED AND CONVICTED UNDER WARRANTS SWORN OUT IN THE MUNICIPAL COURT OF WINSTON-SALEM, N. C., AND FROM THE JUDGMENTS THERE IMPOSED IN OCT.-NOV. 1946, APPEALS WERE TAKEN TO THE SUPERIOR COURT OF FORSYTH COUNTY, WHERE THEY WERE TRIED DE NOVO UPON THE ORIGINAL WARRANTS BEFORE A PETIT JURY, WITH JUDGE J. A. ROUSSEAU PRESIDING. UPON THE CALL OF THE CASES FOR TRIAL PETITIONERS IMMEDIATELY FILED MOTION TO QUASH, ETC. (R. p 4) ALLEGING THAT AT THE TIME OF TRIAL, AND AT THE THEN PRESENT TERM OF COURT, AND FOR A LONG PERIOD OF TIME, VIZ, 10 YEARS AND LONGER, IMMEDIATELY PRIOR THERETO, NEGROES HAVE BEEN ARBITRARILY DESIGNFULLY, AND SYSTEMATICALLY DISCRIMINATED AGAINST AND EXCLUDED FROM JURY SERVICE IN FORSYTH COUNTY (BOTH GRAND AND PETIT) SOLELY BECAUSE OF RACE OR COLOR, IN VIOLATION OF THE DUE PROCESS AND EQUAL PROTECTION CLAUSES OF THE FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES.

(1) The record in these five (5) cases clearly and unmistakably establish the arbitrary, designful, and systematic discrimination and exclusion of qualified Negroes from jury service in Forsyth County, North Carolina, solely on account of and because of race and color.

II

The Supreme Court of North Carolina erred in not holding and decreeing (as alleged in the Motion to Quash, R. at p 7) that the General Statutes of North Carolina requiring as prerequisite qualifications for jury service that all persons shall be tax-listers and tax-payers or freeholders, violate the Fourteenth Amendment of the Constitution of the United States,

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and that the conviction of petitioners upon warrants tried by a petit jury in Forsyth County so made up, selected, and composed of tax-listers and tax-payers exclusively, is void, being in violation of the Fourteenth Amendment.

III

The Supreme Court of North Carolina erred in holding and decreeing that the petitioners, by filing their Motion to Quash prior to the swearing and impanelling of the jury to try the issues in the Superior Court of Forsyth County, did not invoke the proper procedure in challenging the validity and constitutionality of the practices used by the County and the State Courts in drawing up and selecting the petit juries.

ARGUMENT

I

The Supreme Court of North Carolina erred in denying petitioners, all Negroes, the equal protection and due process of law guaranteed by the Fourteenth Amendment of the Constitution of the United States, and laws thereunder, by affirming their conviction upon warrants tried by a petit jury composed exclusively of white persons, from which juries, both grand and petit, an overwhelming majority of the qualified Negroes, namely from 90% to 95%, have for a long period of years been arbitrarily, designfully and systematically discriminated against and excluded from jury selection service solely on account of race or color, by the Board of Commissioners of Forsyth County, North Carolina.

Whenever by any action of a State, whether through its Legislature, through its Courts, or through its Execu-

tive or Administrative offices, persons of a particular color or race are excluded solely because of their race or color from serving as grand or petit jurors in criminal prosecutions of persons of that race the equal protection of the laws is denied to the defendant and he is deprived of due process of law contrary to the Fourteenth Amendment of the Constitution of the United States. This is the settled principle established in a long line of decisions of the United States Supreme Court: Neal vs. Delaware, 103 U. S. 370; Smith vs. Texas, 311 U. S. 128; Hill vs. U. S. 316 U. S. 400. This principle applies whether the action is by virtue of a Statute, Bush vs. Kentucky 107 U. S. 110, 122, Strauder vs. West Virginia, 100 U. S. 303, 309, or by the action of Administrative officers, Rogers vs. Alabama, 192 U. S. 226, 229; Carter vs. Texas, 177 U. S. 442, or whether the exclusion is from service on petit juries, Norris vs. Alabama, 294 U. S. 587, Strauder, vs. West Virginia, 100 U. S. 303, or grand juries, Carter vs. Texas, 177 U. S. 442, 444.

The Supreme Court of North Carolina, while admitting that this principle is well settled, refused to apply it to the facts of these five (5) cases, and by reason of such failure denied petitioners their constitutional rights.

This right to a trial by jurors selected without discrimination is further buttressed and fortified by Federal Statute; as follows:

"No citizen possessing all other qualifications which are or may be prescribed by law shall be disqualified by service as a grand or petit juror in any court of the United States, or of any State, on account of race, color, or previous condition of servitude; and any officer or other person charged with any duty in the selection or summoning of jurors who shall exclude or fail to

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summon any citizen for the cause aforesaid shall, on conviction thereof, be deemed guilty of a misdemeanor, and be fined not more than $5,000."

18 Stat. 336 (1874), 8 U. S. C. sec. 44. See also right of removal to Federal Court, 16 Stat. 144 (1870), 28 U. S. C. sec. 74.

A. PETITIONERS WERE ARRESTED AND CONVICTED UNDER WARRANTS SWORN OUT IN THE MUNICIPAL COURT OF WINSTON-SALEM, N. C. AND FROM THE JUDGMENTS THERE IMPOSED IN OCT.-NOV. 1946, APPEALS WERE TAKEN TO THE SUPERIOR COURT OF FORSYTH COUNTY, WHERE THEY WERE TRIED DE NOVO UPON THE ORIGINAL WARRANTS, BEFORE A PETIT JURY, WITH JUDGE J. A. ROUSSEAU PRESIDING. UPON THE CALL OF THE CASES FOR TRIAL PETITIONERS IMMEDIATELY FILED MOTION TO QUASH, ETC. (R. p 4) ALLEGING THAT AT THE TIME OF TRIAL, AND AT THE THEN PRESENT TERM OF COURT, AND FOR A LONG PERIOD OF TIME, VIZ. 10 YEARS, AND LONGER, IMMEDIATELY PRIOR THERETO, NEGROES HAVE BEEN ARBITRARILY, DESIGNFULLY AND SYSTEMATICALLY DISCRIMINATED AGAINST AND EXCLUDED FROM JURY SERVICE IN FORSYTH COUNTY (BOTH GRAND AND PETIT) SOLELY BECAUSE OF RACE OR COLOR, IN VIOLATION OF THE DUE PROCESS AND EQUAL PROTECTION CLAUSES OF THE 14th AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES.

(1) The record in these five (5) cases clearly and unmistakably established the arbitrary, designful, and systematic discrimination and exclusion of qualified Negroes from jury service in Forsyth County, North Carolina, solely on account of and because of race and color.

PROOF OF DISCRIMINATION—(Evidence)

The law of the State of North Carolina, (Chap. 9, Sec. 1, General Statutes of N. C., 1943, copied in Appendix to this Brief, page 47) requires that the jury lists from which the jurors, both grand and petit, are chosen shall be made up every two (2) years by the Board of County Commissioners of each county from the tax returns of the preceding year for their County, from which they shall proceed to select the names of all such persons as have paid all the taxes assessed against them for the preceding year and are of good moral character and of sufficient intelligence, and that a list of the names thus selected shall be made out by the Clerk of the Board of Commissioners and shall constitute the jury list, and shall be preserved as such.

Did the Board of County Commissioners of Forsyth County observe the law in their preparation of the jury lists? The record in these five (5) cases indicates a vigorous negative.

Virgil W. Joyce, who is the County Tax Supervisor for Forsyth County, and has been since 1938, and whose duties consist of listing, assessing, and billing in connection with tax assessment in Forsyth County, and through whose office all persons, white and colored, who own property in the County, are required to list their property, testified (R. at p 11) that the records of his office, for the current year, 1946, for Forsyth County, show that there are approximately 43,000 tax payers of whom approximately 2500 represent firms, corporations, churches, organizations, etc. and that 32,500 of these are White and 4,000 Colored. He referred to 3,000 additional colored garnishees for poll taxes and an additional 1,000 white persons delinquent in poll taxes only.

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He further testified, when recalled, (R. p 19) that he estimated that 10% of the tax listers of Forsyth County are women; 3% to 5%, non-residents, and 5% to 10% as guardians and guardian accounts.

Walter A. Mickle, the County Tax Collector for Forsyth County, testified (R. at page 12) that 97% of the total taxes levied were collected for the year 1945, including the taxes levied on the 3,000 Colored delinquents and the 1,000 White delinquents, and that all of the taxes levied that were not collected for 1945, was about 1.28%.

Ernie G. Shore, Sheriff of Forsyth County who has been Sheriff of Forsyth County since 1936, testified (R. at p 16);

> "At this present term of the Superior Court of Forsyth County, there were no colored people summoned, there were none drawn or summoned for service on either the petit or Grand jury."

He further testified (R. at p 16);

> "There haven't been very many Colored persons summoned. I would say perhaps a dozen in all Colored persons have been summoned from Dec. 7, 1936, when I took office as Sheriff for Forsyth County, up until the present time". "The figure of a dozen persons is my best estimate."

The Record, at p. 30 shows that there is one Negro juror, viz; Jefferson H. Hairston, whose name was drawn out of the regular jury box and who was summoned by the Sheriff for service on the Petit Jury at this term and who is now serving.

Margaret Bell, an employee of the Winston-Salem Chamber of Commerce, and who has lived in Winston-

Salem all her life, testified (R. p 10) that the last United States Census for Forsyth County in 1940 showed a population of 126,475, of whom approximately 45% were Colored and 55% were White, and that an unofficial estimate of the 1946 population advanced by her was 150,000 persons, with 45% being Colored; that it is one of the functions of the Winston-Salem Chamber of Commerce to investigate matters of census and population and that she has been engaged in this particular work, and that the figures which she testified to have been taken from the records of said Chamber of Commerce.

John D. Slawter, an Attorney of Winston-Salem, with an active trial practice there of some 31 years, testified (R. p 22) that there have been colored jurors who have served on the Grand jury and the Petit jury but could not estimate their number. He thought there were more than 4 or 5 Colored who had served on the grand jury and the petit jury within the past 10 years. He could not state whether there had been as many as 10.

The Solicitor for the State admitted that no Negroes served on the Grand Jury in the year 1946. (R. p 23).

James G. Hanes (Witness for the State), who has been Chairman since 1928 of the County Board of Commissioners of Forsyth County (which has the responsibility of drawing up and selecting the jury lists biennially) testified (R. p 26-30) that he and the other Commissioners turned over the tax cards to the Register of Deeds, who prepared the jury lists. He disclaimed knowledge of the number of names put into the jury box and stated that he did not inquire about the number put in the jury box but left all of these matters up to Mr. Lentz, the

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Register of Deeds. That they kept no record as to those taxpayers who were rejected, and that he would say there are not a great number of them that are rejected. That the element or phase of fact, so far as moral character is concerned, was very, very small in percentage, and that as to intelligence, the percentage rejected would be extremely small, and that he didn't recall anyone, except when someone knows that a man is mentally incapacitated and that would be almost never. He disclaimed knowledge of the separate lists of 236 names for 1941 and 255 names for 1945, both marked "Colored".

From the foregoing evidence it will be seen that there were 40,500 eligible taxpayers in Forsyth County, and making maximum estimates, much higher than warranted by the record, there were 10% women, 5% non-residents, 7.5% guardian accounts, and assuming a figure of 7.5% as persons disqualified for morals and intelligence (although the record would indicate less), a total of disqualifications in the neighborhood of 30% can be approximated, making very generous allowances. Deducing a full 30% from the 40,500 eligible taxpayers, leaves 28,350 prospective jurors for the jury lists compiled in 1945. Yet only 10,622 found their way into the jury lists as agreed to by "Stipulations of Counsel" filed in the Superior Court, (R. p 8). The case of the missing 17,728 prospective jurors is a serious irregularity that can be charged against the Board of County Commissioners of Forsyth County.

Again, it should be observed from the "Stipulation of Counsel" (R. p 8) that the total number on the jury list for the biennial period of 1945-1947 was 332 less than that for the biennial period of 1935-1937 and in face of the fact that a period of 10 years had elapsed,

during which 10 year period of time the population of Forsyth County, which is highly industrialized and constitutes one of the State's wealthiest and most populous Counties, was growing by leaps and bounds as shown by the U. S. Census Tables. (For the year 1920—77,267; for the year 1930—111,681; for the year 1940—126,475); and an estimate of the population for the year 1946 of 150,000 as testified by Margaret Bell, witness, an employee of the Winston-Salem Chamber of Commerce.

Continuing the examination to the question of discriminated Negroes, if 4,000 were considered the number of paid-up Colored taxpayers, and 30% were removed as disqualified, then a balance of 2,800 should have appeared as eligible for jury service on the jury lists of Forsyth County. On the other hand, if the 7,000 were used (including the 3,000 delinquents) then 4,900 would represent the Colored persons who should have been included in the jury list. If the 5,500 figure is utilized, allowing for the collection of about 50% of delinquent accounts, then 3,850 Negroes should have been listed on the jury list for jury service.

But only 255 Colored taxpayers were placed on the 1945-1947 jury list. On the basis of 7,000 eligible Negro jurors, then only 5% were placed on the jury list; on the basis of 2,800 eligible, less than 10% were listed; if 3,850 were considered eligible, then only 7% were listed.

As to the White taxpayers, there were about 23,450 eligible for the jury list for 1945-1947, of whom only 10,367 were actually placed thereon, thus omitting and leaving off over 55% of their number.

As some of the figures or items above, that were testified to, are based on exact records, and as to others the testimony necessarily dealt in approximations, we have

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prepared for the convenience of the Court, the following table which, we believe, presents a fair and graphic summary of witnesses, Virgil W. Joyce and Walter A. Mickle's testimony: (R. p 11 and R. p 12).

Table

Total number of taxpayers (Witness, V. W. Joyce) (R. p 11) ----------		43,000
Less firms, corporations, churches, partnerships, etc., listed (Joyce R. p. 11)		2,500
Leaving (net) total number of individuals listed as taxpayers ----------		40,500
Which are made up of; (White) ------	32,500	
(White) Delinquents, ----------	1,000	
(Colored) ----------	4,000	
(Colored) Delinquents, ----------	3,000	
	40,500	
Reduced by;		
Non-resident tax listers, ---------3%	to 5%	
Women tax listers, (Witness, Joyce) (R. p 19) ----------10%		
Guardians for minors tax listers, (Witness, Joyce) (R. p 19) 5% to 10%		
Taxes uncollected about (Witness W. A. Mickle) (R. p 12) ----------	1.28%	
Tax listers who are not of good moral character and who do not have sufficient intelligence (under GS-9-1 to qualify for jury service ----------3.72%		
	30.00%	12,150

Thus leaving (net) a total of individual male resident taxpayers of Forsyth County whose names under the General Statutes, are entitled to be placed in the jury box of said County, ------		28,350
ACTUALLY TODAY THERE ARE IN THE JURY BOX only, ------		10,622
THUS LEAVING A SHORTAGE (OR DISCREPANCY) OF NAMES NOT IN THE JURY BOX of ----		17,728
WHITE ----------	33,500	
Deduct for women, non-residents, guardians, etc. (Above), (30%) -------	10,050	
	23,450	
Total number of White taxpayers whose names are now in the jury box (for 1945-1947) as shown by "Stipulation of Counsel" ----------	10,367	
(Shortage) ----------		13,083
Percent of White taxpayers whose names are in the jury box ----------	44.28%	
Percent of White taxpayers whose names were kept out of the jury box -------	55.72%	
COLORED (NEGROES) --------	7,000	
Deduct for women, non-residents, guardians, etc. (Above), (30%)--------	2,100	
	4,900	

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Total number of Colored taxpayers whose names are now in the jury box (for 1945-1947), as shown by "Stipulation of Counsel." ----------	255
(Shortage) ----------	4,645
Percent of Colored taxpayers whose names are in the jury box, ----------	5.48%
Percent of Colored taxpayers whose names were kept out of the jury box	94.52%

The conclusion to be drawn from the above analysis is that 55% of the White prospective jurors were discriminated against and that from 90% to 95% of the Negroes were subjected to arbitrary discrimination and exclusion in the preparation of jury lists. Could a more flagrant case of discrimination be set forth?

Moreover in "Stipulation of Counsel" (R. p 8) the existence of separate lists marked "Colored" for the biennial years 1941 and 1945 was admitted. What was the purpose of such lists? On their face, they segregate on the basis of color a section of the eligibles from the remainder. What could have been the purpose of this segregation except to identify the Negroes as a group on the jury lists in order to limit and to exclude them from service on the juries? What legal justification for this exclusionary practice could there be? Certainly not qualifications of moral character or intelligence, which the Chairman of the Board of County Commissioners stated was responsible for a "very, very small" percentage of rejections. And, as shown above, there was an abundance of eligible jurors. There was no explanation in the evidence for these separate Negro lists.

The best proof of the results of the Board's discriminatory practices in effectuating the exclusion of

Negroes from juries is what actually occurred. From the lips of the Sheriff himself, who has held office continuously since 1936, it was recorded that no Negroes were summoned or served on the grand jury for the present term, which is the term embracing the trial of the case at bar, and that only one Negro, Jefferson H. Hairston, had been drawn and summoned for service, and was serving as a petit juror at the present term of said court. His best estimate of the number of Colored people summoned for a period of last ten years was a dozen persons.

Local citizens, Gene Pratt, and Christopher C. Kallum, testified that they had seen few, if any, on the petit juries.

There was no evidence by the State to rebut the testimony offered on behalf of petitioners that the exclusion of Negroes from jury service in Forsyth County was all but complete.

The "Stipulation of Counsel" filed in the Superior Court, (R. p 8) was filed in all of petitioner's five (5) cases from which Stipulation it appears that a total of 51,916 names of prospective jurors were on the biennial jury lists of Forsyth County for the biennial period of 1935, 1937, 1939, 1941, 1943, and 1945. The Stipulation also reveals a separate list of Negroes marked "Colored" was drawn in 1941, and also again in 1945, as prospective jurors. It is uncontradicted that these separate lists marked "Colored" contained the names of all the Colored jurors whose names appeared in the box for the biennial jury lists of 1941 and 1945. For the year 1941 the names of only 236 Negroes appear in a total of 8,872 prospective jurors; for the biennial period of 1945-1947 (which includes the Nov. 1946 term of the court during which petitioners were tried)

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the names of only 255 Negroes appear in a total of 10,622 prospective jurors.

Now let us see how many jurors on the jury lists for Forsyth County were summoned by the Sheriff for jury service, both grand and petit, and who appeared for service in the Superior Court during the 10 period, from Oct. 1, 1936 up to and through the October 1946 Term of said Court, and what was the proportion of Negroes summoned to the Whites who were summoned, as evidencing further discrimination.

Wm. E. Church, Clerk of the Superior Court of Forsyth County, and who has served as said Clerk since Dec. 1, 1930, testified (R. p 19) that he had made a search of the records of his office for the purpose of showing the number of jurors who had been summoned and the number who had actually served. Based on his testimony, approximately 4,087 jurors in all had served during said ten (10) year period. Of this number a maximum of only 12 summoned was of the Negro race as testified to by Ernie G. Shore, Sheriff (R. p 16).

Because some of the figures given by Wm. E. Church, Clerk for part of the period were precise, while others were approximations, we have prepared for the convenience of the Court, the following table which projects his testimony graphically, and, we believe, fairly, as follows:

TABLE

From Oct. 12, 1936, through July 11, 1938 (1 3-4 yrs.)		
Total number summoned	1,012	
Excused from service	113	
Total serving		899

From July 12, 1938, through January 1, 1942 (3 1-2 yrs.)		
Total number summoned	2,024	
Excused from service,	226	
Total serving,		1,798
(Note: Witness Church testified that the number summoned and excused for this period was in the same ratio as in the preceding period.)		
From January 1, 1942, to (Spring) March 1, 1946 (4 1-6 yrs.)		
Total number summoned	1,204	
(Note: The witness testified that during the War period the number drawn and summoned was in ratio of about 50 per cent of the number in the preceding periods.)		
Number excused based on same ratio	134	
Total serving		1,070
From March 1, 1946, to (Oct. Term Court 1946) Oct. 7, 1946, (7 1-2 mos.)		
Total number summoned,	360	
(Note: The witness testified that the number summoned for this period was in the same ratio as in the 1936 to 1938 period.)		
Number excused	40	
Total serving		320

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GRAND TOTAL SERVING FROM Oct. 12, 1936 TO Oct. 19, 1946, (or a period of ten years) ----------		4,087
TOTAL COLORED SERVING ON JURY DURING 10 YEAR PERIOD	12	
TOTAL WHITE SERVING ON JURY DURING 10 YEAR PERIOD------	4,075	
		4,087

Of a total number of approximately 4087 jurors who served over the 10 year period extending from October 1936 to Oct. 1946 approximately 12 only were of the Negro race and the balance, 4,075, were of the White race. Could evidence of a more glaring discrimination be shown?

In the face of this overwhelming testimony of arbitrary and systematic exclusion and discrimination against Negroes, the Supreme Court of North Carolina in its opinion in 227 N. C. 552 State vs. Koritz, Etal, (at p. 556) held that the trial Judge's findings that there was no discrimination in the selection of the jury in regard to color, is supported by the evidence, and that no discrimination was intended or resulted from the manner in which the jury was prepared.

In 245, U. S. 60 Buchanan vs. Warley, Justice Day, in an unanimous opinion of the court, in discussing the history of the 14th. Amendment and the rights and benefits secured therein, said;

"While a principal purpose of the latter Amendment was to protect persons of color, the broad language used was deemed sufficient to protect all persons, white or black, against discriminatory legislation by the States. This is now the settled law. (p. 76).

"What is this but declaring that the law in the States shall be the same for the black as for the white; that all persons, whether colored or white, shall stand equal before the laws of the States, and, in regard to the colored race, for whose protection the amendment was primarily designed, that no discrimination shall be made against them by law because of their color?"

"The 14th. Amendment makes no attempt to enumerate the rights it designed to protect. It speaks in general terms, and those are as comprehensive as possible. The language is prohibitory; but every prohibition implies the existence of rights and immunities prominent among which is an immunity from inequality of legal protection, either for life, liberty, or property. Any State action that denies this immunity to a colored man is in conflict with the Constitution." (p. 77).

The accused cannot demand, as a matter of right, a mixed jury or a pro rata proportion of Negro to White.

"What an accused is entitled to demand under the Constitution of the United States, is that in organizing the grand jury as well as the impanelling of the petit jury, there shall be no exclusion of his race, and no discrimination against them because of their race or color". Martin vs. Texas 200 U. S. 316; Thomas vs. Texas, 212 U. S. 278.

A token compliance with the mandate of the 14th. Amendment, it is submitted, is equivalent to a studied and complete disregard of the meaning of equal protection of the law with respect to the selection of jurors. Hill vs. Texas, 316 U. S. 400.

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The comment of the Supreme Court in analogous cases is illuminating. In Pierre vs. Louisiana, 306 U. S. 354, the court stated at p. 358;

"Indictment by grand jury and trial by jury cease to harmonize with our traditional concepts of justice at the very moment particular groups, classes, or races—otherwise qualified to serve as jurors in a community—are excluded as such from jury service. The 14th Amendment entrusts those who because of race are denied equal protection of the laws in a State first to the revisory power of the higher courts of the State, and ultimately to the review of this court."

The above case involved a motion to quash because of discrimination in the method of constituting the grand jury. Petitioner's witnesses testified that between 1896 and 1936 no Negroes had served on grand juries. A venire of 300 in 1936 contained names of three Negroes, one dead; one called for service in January 1937, was the only Negro called for jury service in memory of all witnesses including the Sheriff. About one-half the population of the parish was Negro.

The Court said that the fact that one-half the population was Negro demonstrated that there could have been no lack of colored residents over 21 years of age. . . .

"There is no evidence on which even an inference can be based that any appreciable number of the otherwise qualified Negroes in the Parish were disqualified for selection because of bad character or criminal records . . . The testimony introduced by petitioner's own motion to quash create a strong prima facie showing that Negroes had been systematically excluded because of race from the grand jury and the venire from which it

was selected. Such an exclusion is a denial of equal protection of the laws contrary to the Federal Constitution—the supreme law of the land .... Principles which forbid discrimination in the selection of petit juries also cover the selection of grand juries. It is a right to which every colored man is entitled, that, in the selection of juries to pass upon his life, liberty, or property, there shall be no exclusion of his race, and no discrimination against them because of their color."

In Neal vs. Delaware, 103 U. S. 370, the Court sustained a motion to quash on the strength of an affidavit alone because (page 397):

"... the fact (so generally known that the court felt obliged to take judicial notice of it) that no colored citizen had ever been summoned as a juror in the courts of the State—although its colored population exceeded 20,000 in 1870 and in 1880 exceeded 26,000, in a total population of less than 150,000—presented a prima facie case of denial, by the officers charged with the selection of grand and petit jurors, of that equality of protection which has been secured by the constitution and laws of the United States. It was, we think, under all the circumstances, a violent presumption which the State court indulged, that such uniform exclusion of that race from juries, during a period of many years, was solely because in the judgment of its officers, fairly exercised, the black race in Delaware were utterly disqualified, by want of intelligence, experience, or moral integrity, to sit on juries. The action of those officers in the premises is to be deemed the act of the State, and the refusal of the State court to redress the wrong by them committed was a denial of a right secured to the prisoner by the Constitution and laws of the United States."

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In Norris vs. Alabama, 294 U. S. 587, in an opinion dealing with a motion to quash an indictment, it was said at page 593:

"The State Court rested its decision upon the ground that even if it were assumed that there was no name of a Negro on the Jury roll, it was not established that race or color caused the omission. The Court pointed out that the statute fixed a high standard of qualifications for jurors and that the Jury Commissioner was vested with a wide discretion. The Court adverted to the fact that more white citizens possessing age qualifications had been omitted from the Jury roll than the entire Negro population of the County, and regarded the testimony as being to the effect that the matter of race, color, politics, religion, or fraternal affiliations had not been discussed by the Commission and had not entered into their consideration and that no one had been excluded because of race or color . . . and the Commissioner testified that in the selections for the Jury roll, no one was automatically and systematically excluded on account of race or color; that he 'did not inquire as to color, that was not discussed.' "

At Page 594, the Court added:

"But in appraising the action of the Commissioners, the statements cannot be divorced from other testimony. As we have seen, there was testimony, not overborne or discredited, that there were in fact Negroes in the County qualified for jury service. That testimony was direct and specific. After eliminating those persons as to whom there was some evidence of lack of qualifications, a considerable number of those remained. The fact that the testimony as to these persons, fully identified, was not challenged by evidence

approximately direct, cannot be pushed aside. There is no ground for an assumption that the names of these Negroes were not on the preliminary list. The inference to be drawn from the testimony is that they were on that preliminary list, and were designated on that list as the names of Negroes, and that they were not placed on a Jury roll. There was thus presented a test of the practice of the Commissioners. Something more than mere general asseverations was required. Why were these names excluded from the jury? Was it because of the lack of statutory qualifications? Were the qualifications of Negroes actually and properly considered?"

"The testimony of the Commissioner leads to the conclusion that these or other Negroes were not excluded on account of age, or lack of esteem in the community for integrity and judgment, or because of disease or of any other qualification. The Commissioner's answer to specific inquiry upon this point was that Negroes were never discussed . . . We think that the evidence that for a generation or longer no Negro had been called for service on any jury in Jackson County, that there were Negroes qualified for jury service, that according to the practice of the jury commission their names would normally appear on the preliminary list of male citizens of the requisite age, but that no names of Negroes were placed on the jury roll, and the testimony with respect to the lack of appropriate causes of the disqualification of Negroes established the discrimination which the Constitution forbids. The motion to quash the indictment on that ground should have been granted."

Finally, the Supreme Court had to consider a motion to quash on an indictment and conviction for rape in the case of Smith vs. Texas, 311 U. S. 128.

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In that case the Negroes of the county comprised 20% of the population and 10% of the poll tax payers. A minimum of 3,000 to 6,000 measured up to qualifications for jury service. From 1931 to 1938, five of 384 grand jurors were Negroes. Total number summoned for grand jury service was 512, of whom 18 were Negroes. Of the 18 summoned, 13 appeared as the last names on a 16-man jury list, the first 12 of whom were selected.

As a result of this numbering, only 5 ever served, whereas 339 of the 494 white men summoned actually served. It also appeared that of the 32 grand juries empaneled, only 5 had Negro members, while 27 had none, and that of the 5, the same individual served three times, so that only three individual Negroes served at all. The tabulation of colored citizens serving on grand juries was as follows; 1931—1; 1932—2; 1933—1; 1934—1; 1935—none; 1936—1; 1937—none; 1938—none.

The Court, passing on these facts stated at page 130:

"It is part of the established tradition in the use of juries as instruments of public justice that the jury be a body truly representative of the community. For race discrimination to result in the exclusion from jury service of otherwise qualified groups not only violates our Constitution and the laws enacted thereunder (18 Stat. 336, 8 U. S. C., sec. 44), but is at war with our basic concepts of a democratic society and a representative government. We must consider this record in the light of these important principles. The fact that the written words of a states' laws hold out a promise that no such discrimination will be practiced is not enough. The 14th Amendment requires equal protection to all must be given—not merely promised . . . Chance and accident alone could hardly have brought about the

listing for grand jury service of so few Negroes from among the thousands shown by the undisputed evidence to possess the legal qualifications for jury service."

The Court stated that the denial by two jury commissioners, that they intentionally, arbitrarily or systematically discriminated against Negro jurors, was not sufficient.

"But even if their testimony were given the greatest possible effect, and their situation considered typical of that of the 94 commissioners who did not testify, we would still feel compelled to investigate the decision below. What the 14th. Amendment prohibits is racial discrimination in the selection of grand juries. Where jury commissioners limit those from whom grand juries are selected to their own personal acquaintance, discrimination can arise from commissioners who know no Negroes as well as from commissioners who know but eliminate them. *If there has been discrimination, whether accomplished ingenuously or* ingeniously, the conviction cannot stand" (Italics supplied).

What more appropriate comment could be made with respect to the five (5) cases at bar?

The Supreme Court of North Carolina, in its opinion in 227 N. C. 552, refers to the case of State vs. Walls, 211 N. C. 487, appeal dismissed, 302 U. S. 635, as being analogous to the cases at bar. It is respectfully submitted that an examination of the last cited case reveals no identity with the facts of the present cases at bar. In the Walls case, there was no positive evidence as to the exclusion of Negroes in the record, aside from proof that

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in the preparation of the jury lists there was the use of different colored inks for white and Negro citizens.

There is consequently in these five (5) cases no resemblance between the unchallenged proof of discrimination and exclusion by the Board of County Commissioners and the Superior Court of Forsyth County, and the failure to establish discrimination in the Walls case.

The five (5) cases at bar are not at all similar to, and may be distinguished from and in many respects differentiated from, the cases of Fay vs. New York and Bove vs. New York, 91 U. S. (L. Ed.) 1517, as follows:

First, in those cases the Negro or race question was not raised or brought in question, and therefore 18 Stat. 336 (1874) 18 U. S. C. Sec. 44, (enacted under the power granted Congress under the provisions of Sec. 5 of the 14th Amendment of the Federal Constitution) could not be availed of. In the case at bar petitioner is a Negro and the Negro or Race question is raised and brought in question and said Statute, 18 U. S. C. Sec. 44 is relied upon and set up.

Second, in those cases the alleged discrimination was not shown to exist for any considerable period of time past, while in the case at bar the discrimination is alleged and proven to have existed for a long period of time, namely, 10 years.

Third, in those cases the court said: "The defendants raise no question as to the constitutionality of the general statutes of New York which prescribe the qualifications, disqualifications and exemptions for ordinary jury service. Neither is any question raised as to the administration of these general statutes by which the population of New York County, numbering some 1,800,000 is sifted to produce a general jury panel of about 60,000 unless it be there is discrimination against wom-

en" (page 1521). In the case at bar the constitutionality of the General Statutes of North Carolina, with their qualifications, disqualifications and exemptions, as well as the administration of these General Statutes, is raised and set up.

The question of discrimination against white persons, which was presented in the petition for writs of certiorari, is not urged here.

On Dec. 8, 1947, in Patton vs. Mississippi, 92 U. S. (L. Ed.) 164, this Court once again had the solemn duty of declaring that State Statutes or administrative practices, which result in the arbitrary and systematic exclusion of Negroes from grand and petit juries, deny to Negro defendants in criminal cases the equal protection of the laws demanded by the 14th. Amendment. In reaching this conclusion, the Court cited "a long and unbroken line of our decisions" beginning with Strauder vs. West Virginia, 100 U. S. 303, decided 67 years ago.

Patton's Case then serves as a timely reminder by this Court that arbitrary and systematic exclusion from jury service because of race "not only violates our Constitution and the laws enacted under it, (Citing 18 Stat. at L. 336, 18 U. S. C. A. Sec. 44) but is at war with our basic concepts of a democratic society and a representative government." Smith vs. Texas, 311 U. S. 128, 130.

Nor can it make any difference, whether the petitioner, who seeks redress for the violation of these legal principles and their underlying political concepts, has been unfairly convicted of a misdemeanor or of a capital offense. The application of the legal principles is the same. For these exclusionary jury practices to be effectively extirpated, condemnation must reach those

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cases in which a man's liberty is the penalty as well as those where his life may be forfeited. It has indeed become timely to serve notice on State and Local officials that justice must be done in the small or lesser cases as well as in the larger or more serious ones. A person charged with a misdemeanor is as much entitled to the equal protection of the laws as the person who is charged with murder or rape. "Equal protection of the laws is something more than an abstract right. It is a command which the State must respect, the benefits of which *every person* may demand. Not the least merit of our constitutional system is, that its safeguards extend to *all*—the least deserving as well as the most virtuous". Italics supplied. Hill vs. Texas, 316 U. S. 400, 406.

In *Patton's Case,* the Court also had occasion to reiterate the well-established rule to the effect that;

"Whether there has been systematic racial discrimination by administrative officials in the selection of jurors is a question to be determined from the facts in each particular case." Patton vs. Mississippi, 92 U. S. (L. Ed.) 164, 165.

The rule is, as was fully stated in an earlier landmark, that "when a claim is properly asserted—as in this case—that a citizen, whose life is at stake, has been denied the equal protection of his country's laws on account of his race, it becomes our solemn duty to make independent inquiry and determination of the disputed facts—for equal protection to all is the basic principle upon which justice under law rests." Pierre vs. Louisiana, 306, U. S. 354, 358. If this were not the rule, "review by this Court would fail of its purpose in safeguarding constitutional rights." Norris vs. Alabama, 294 U. S. 587, 590.

Although the evidence in these five (5) cases at bar

is based in some particulars on approximations, the essential or main facts are not in dispute so that we are not asking the Court to pass on or to select from "disputed facts".

What does the proof show? It is double-barrelled. In the first place, the undisputed proof out of the mouths of appropriate County officials, (Witnesses, Virgil W. Joyce, and Walter A. Mickle) is that 7,000 Negroes were listed on the tax rolls or tax-lists of Forsyth County, and after making the maximum reduction of 30% for the several disqualifications, including lack of good moral character and sufficient intelligence, a total of 4,900 Negroes are left in Forsyth County who were eligible for jury service and whose names should have been placed in the regular County jury-list box to be drawn out, according to law, as conditions required. *But counsel for the State stipulated and agreed that a separate jury list marked "Colored" contained the names of only 255 Negroes for the biennial period,* 1945-1949, *or less than 6% of the total number of Negroes eligible.*

These facts, if there were nothing more, should be sufficient to show purposeful discrimination in jury service, based on race.

The evidence, taken in its most favorable light to the State, shows that the presence of a Negro on a petit jury or on a grand jury in Forsyth County is indeed a rare phenomenon. Witness, John D. Slawter, who has practiced law in the County at Winston-Salem for the past 31 years and who is one of the leading, active, attorneys there engaged in the criminal and civil practice in the Superior Court, testified (R. at p 22) that he thought there were more than 4 or 5 Colored persons who had served on the grand jury and the petit jury within the past 10 years but he was reluctant to state that there were as many as 10 Negroes.

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We concede, of course, that the burden of proving discrimination is on petitioners, Akins vs. Texas, 325 U. S. 398, but we think that the evidence in this record, just summarized, makes a very strong *prima facie* case, cf. Norris vs. Alabama, 294 U. S. 587, 594, and so strong that evidence on the other side has to be weighty indeed to overcome it.

But what does the evidence on the other side, come to? The fact is that no real effort was made by the State to try and overcome petitioner's evidence, and obviously so, because none could be had. The Sheriff, Ernie G. Shore, who is a County officer, and who has entire charge and control of summoning all prospective jurors in Forsyth County, testified that he had been sheriff of the County for the past 10 years and that (R. at page 16) "perhaps a dozen in all Colored persons have been summoned" during the past 10 years on both grand and petit juries.

We most respectfully submit that even on the State's evidence that petitioners have successfully carried the burden of proving racial exclusion and discrimination. With perhaps a dozen Negroes summoned within the past 10 years would make approximately one Negro, or a little over, a year. No mathematical calculations or gyrations can explain away the eventual qualification of only one Negro a year out of an original group of 4,900.

The infinitesimal number of Negroes who *served* on grand and petit juries in Forsyth County is further highlighted when the total number of persons serving is considered. As we have indicated by "Table" (Brief p 21) based on Wm. E. Church, Clerk's testimony) a fair estimate of the total number of persons who served during the 10 year period from 1936 to 1946, is 4,087, and if we assume that 12 Negroes actually served on the grand or petit jury during this 10 year period, this means that

one Negro only saw jury service each year as compared with 340 Whites each year who saw jury service. Now if we turn to the other "Table" (Brief p 16) based on Virgil W. Joyce, and Walter A. Mickle's testimony relative to taxpayer's lists) we find 4,900 Negroes were eligible for jury service as against 23,450 White, or a proportion of less than 1 to 5.

What is this but discrimination? And in the absence of explanatory evidence from the State, what is this but racial discrimination? The answer is peculiarly buttressed by the circumstance that the County maintained separate jury lists marked "Colored". If race cannot serve as a distinction for jury service, what purpose can be served by the maintenance of separate jury lists on the basis of race? The State has not supplied the answer.

We therefore most respectfully submit that the conclusion reached by the Supreme Court of North Carolina that racial discrimination has not been shown "is so lacking in support in the evidence that to give it effect would work that fundamental unfairness which is at war with due process", Lisenba vs. California, 314 U. S. 219, 238, or equal protection", Akins vs. Texas, 325 U. S. 398, 402.

The Court's speculation in *Smith's Case* (Smith vs. Texas, 311 U. S. 128, 131), that "Chance and accident alone could hardly have brought about the listing for grand jury service of so few Negroes from among the thousands shown by the undisputed evidence to possess the legal qualifications for jury service" is most pertinent to the five (5) cases at bar.

The case of Akins vs. Texas, 325 U. S. 398, was cited in Patton vs. Mississippi, 92 U. S. (L. Ed.) 164. In the Akins case the only alleged evidence of discrimination against Negroes consisted in willful limitation by the Grand Jury Commissioners of one Negro only on the grand jury panel of 16 men at the term of court at which

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the indictment against the petitioner was found, and in referring to this fact, in this case, at page 400 the Court said; " This is petitioner's only complaint as to racial discrimination. No other errors in the proceedings are pointed out". The Court therefore, in the Akins case, from the record evidence, was not convinced that there was deliberate and intention limitation of the number of Negroes on the grand jury list. But the evidence in the five (5) cases at bar is entirely different from and goes way beyond that in the Akins case.

II

The Supreme Court of North Carolina erred in not holding and decreeing, as alleged in the Motion to Quash, etc. (R. p 7) that the General Statutes of North Carolina, requiring as prerequisite qualifications for jury service that all persons shall be tax-listers and tax-payers, or freeholders, violate the Fourteenth Amendment of the Constitution of the United States and that the conviction of petitioners upon warrants tried by a petit jury in Forsyth County so made up, selected, and composed of tax-listers and tax-payers exclusively, is void, being in violation of the Fourteenth Amendment.

Despite the result reached by the Court in Fay vs. New York, and Bove vs. New York, 91 U. S. (L. Ed.) 1517, these cases are now authority for the proposition that State jury selection statutes or practices which discriminate against particular classes or groups in the community, are inconsistent with either the equal protection clause or the due process of law clause of the Fourteenth Amendment, or both.

It is the claim of petitioners that Chapter 9 of the General Statutes of North Carolina, when considered to-

gether with Chap. 105, Section 341 of the General Statutes of North Carolina, so limit the selection of grand and petit jurors and freeholders as to amount to a denial of equal protection and due process, and are therefore unconstitutional. Taxpayers include not only all property owners, but also, by virtue of Chap. 105, Section 341, all poll-tax payers. Since only male persons between the ages of 21 and 50 are required to pay poll taxes, all male persons over 50, who are propertyless, are completely excluded from jury service, by the terms of the Statute. Chap. 9, Sec. 1, restricts the jury list to tax payers, who are either property owners or poll tax payers. Chapter 9, Sec. 11, requires that talesmen be freeholders.

As a consequence, the payment of taxes and the ownership of property are made prerequisites for jury service, and an entire class of propertyless males, both white and Colored, over 21 years of age, are precluded from jury service. These disqualifications have no reasonable relationship to competency for jury service, but exclude a substantial economic segment of the community from involvement in the trial of causes that may well effect their status. Viewed from the aspect of the accused, defendants coming from the lowest economic levels of society, are confronted with juries that are unrepresentative of the class of persons from which they emerge.

The five (5) cases at bar represent a vivid example to illustrate how humble toilers may suffer prejudice when tried by jurors whose qualifications include the payment of taxes and the ownership of property. These lowly laundry workers were involved in a strike and labor dispute that can arouse the emotions of an entire community to a fever pitch and divide its sentiment along strictly economic lines. Can it be said that these peti-

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tioners could secure a fair trial from a jury that excluded the propertyless?

The Supreme Court of the United States reasoned along similar lines in the case of Thiel vs. Southern Pacific Co., 328 U. S. 217 (at p 223) as follows:

"Wage earners, including those who are paid by the day, constitute a very substantial portion of the community, a portion that cannot be intentionally and systematically excluded in whole or in part without doing violence to the democratic nature of the jury system. Were we to sanction an exclusion of this nature, we would encourage whatever desires those responsible for the selection of jury panels may have to discriminate against persons of low economic and social status. We could breathe life into any latent tendencies to establish the jury as the instrument of the economically and socially privileged. That we refuse to do."

See also Glasser vs. U. S., 315 U. S. 60, 85.

Chapter 9, General Statutes of North Carolina, Section 11, provides that to avoid a defect in the number of available petit jurors the Court may direct the sheriff tc summon from the community talesmen who must be freeholders, however; or the Court may have the names of such talesmen chosen from the regular jury box.

It is submitted that the statute is unconstitutional since it fixes as a prerequisite to eligibility for jury service as talesmen the ownership of real property. This is discriminatory against those who do not own real estate. The same arguments and reasons apply here as were made in connection with the statutes requiring payment of taxes as a precondition for jury service.

In the Thiel case (Thiel vs. Southern Pacific Co., supra) a passenger on a railroad sued in the Federal

Court for personal injuries suffered by him on a train. He moved to strike the jury panel on the ground that there was a deliberate and intentional exclusion from the jury list of persons who worked for a daily wage. Testimony was taken establishing such a practice, but the particular jury which heard the case did have at least 5 members of the laboring class on it. The high court reversed the District Court, which had denied the motion to strike the jury panel. The Court stated:

"It is likewise immaterial that the jury which actually decided the factual issue in the case was found to contain at least five members of the laboring class. The evil lies in the admitted wholesale exclusion of a large class of wage earners in disregard of the high standards of jury selection. To reassert those standards, to guard against the subtle undermining of the jury system, requires a new trial by a jury drawn from a panel properly and fairly chosen."

A jury must be fairly and impartially drawn from the community, without discrimination. The 14th Amendment operates as a prohibition against the policy or practice of excluding any particular group or class. A jury should be fairly and impartially made up out of the whole fabric of the community. (See Smith vs. State, 45 Tex. Cr. 405, 77 S. W. 453 (1903); 19 Boston Un. Law Rev., 413, 430). Quotas for particular races do not make properly constituted jury lists or panels; it is the bona fide absence of discrimination in drawing up these jury panels in the first instance which makes a fair and impartial jury.

It is submitted that the method of selecting the jury by systematically excluding propertyless persons from the box made the jury panel invalid.

In the Thiel vs. Southern Pacific Co., 328 U. S. 217, (at p. 225) the Court stated that "it becomes unnecessary to determine whether the petitioner was in any way prejudiced by the wrongful exclusion or whether he was one of the excluded class." It was sufficient, the court said, that "we cannot sanction the method by which the jury panel was formed in this case," (and cases there cited).

Likewise, in Glasser vs. U. S. 315 U. S. 60, the Supreme Court stated that had there been sufficient proof of deliberate selection of juries from a particular private organization of women, the panel would have been invalidated because of the exclusion of all women not members of the organization. This apparently would have been true because a fair and impartial jury would have been lacking, despite the fact that the accused was male.

In Ballard vs. U. S. 91 (L. Ed.) 195, the indictment was dismissed as to the male and female defendants because of the purposeful and systematic exclusion of women from the panel from which the grand jury was drawn.

The logical basis of these decisions is that the failure to draw a jury impartially and fairly from the community, without the exclusion of any group or class, is deemed prejudicial, irrespective of the particular status of the defendant.

While it is true that earlier decisions of this Court have apparently recognized State requirements of property ownership, tax payments, etc. as constitutional conditions precedent to jury service, yet it is submitted that present considerations call for re-examination of these disqualifying provisions.

Where grave economic conflicts arise in communities, the exclusion of the propertyless from jury service

can make a mockery of trial by jury for the humble worker enmeshed in the coils of the law. This is the spirit that animates the decision of this Court in Thiel vs. Southern Pacific Co., 328 U. S. 136.

No more pithy summary of petitioner's argument can be found than Mr. Justice Burton's statement in his dissent in Ballard vs. U. S. 91 U. S. (L. Ed.) 195, 205 that exclusion of an economic group from jury service detracts from "the representative character of the jury list, in a manner contrary to the tradition and purpose of the jury system."

Petitioners of course do not argue that they had the right to be tried by a jury composed only of persons drawn from the working class of which he or she is a member, but their complaint is that the jury selection Statutes discriminate to an obvious and considerable extent against the class of which he is a member.

In Fay vs. New York, 91 U. S. (L. Ed.) 1517, 1538, Mr. Justice Murphy said; "Under our Constitution the jury is not to be made the representative of the most intelligent, the most wealthy or the most successful, nor of the least intelligent, the least wealthy or the least successful. It is a democratic institution, representative of all qualified classes of people."

The "shoe on the other foot" argument used by Mr. Justice Douglas in Ballard vs. U. S. 91, U. S. (L. Ed.) 195, 198, in connection with the exclusion of women from juries, may be used here with even greater emphasis to bring out the grossness of the economic discrimination imposed by the North Carolina Jury selection Statutes. In these five (5) cases at bar petitioners, all of whom are poor workers, were tried for an offense growing out of a labor strike and labor dispute. Let us assume, how-

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ever, that it was the employer who was being tried and that the jury statutes restricted jury service to non-tax-paying wage earners only Who would then be so bold as to argue that the employer was being given a trial by a jury of his peers to which he is entitled by the Constitution? It is submitted that those who now argue that Thiel vs. Southern Pacific Co., 328 U. S. 217, should be restricted to proceedings in the Federal Courts because over such proceedings this Court "may exert a supervisory power with greater freedom to reflect our notions of good policy than we may constitutionally exert over proceedings in State Courts" and because "these expressions of policy are not necessarily embodied in the concept of the due process of law", Fay vs. New York, 91 U. S. (L. Ed. 1517, 1531-32, have overlooked the following language in the *Thiel Case;* 328 U. S. 217, 220, as follows:

> "The American tradition of trial by jury, considered in connection with either criminal or civil proceedings, necessarily contemplates an impartial jury drawn from a cross-section of the community. Smith v. Texas, 311 U. S. 128, 130, 85 L. Ed. 84, 86, 61, S. Ct. 164; Glasser v.United States, 315 U. S. 60, 85, 86 L. Ed. 680, 707, 62 S. Ct. 457. This does not mean, of course, that every jury must contain representatives of all the economic, social, religious, racial, political and geographical groups of the community; frequently such complete representation would be impossible. But it does mean that prospective jurors shall be selected by court officials without systematic and intentional exclusion of any of these groups. Recognition must be given to the fact that those eligible for jury service are to be found in every stratum of society. Jury competence is an individual rather than a group or class matter. That fact lies at the very heart of

the jury system. To disregard it is to open the door to class distinctions and discriminations which are abhorrent to democratic ideals of trial by jury." (At 220).

Does this language reflect merely this Court's "notions of good policy" or does it reflect this Court's conviction as to the meaning of the mandates of the Fourteenth Amendment? And would not this Court be prepared to apply that conviction to the case we have put? To try a person owning property by a jury from which property owners are systematically excluded, or to try a person not owning property by a jury from which the propertyless are systematically excluded,—either practice opens the door "to class distinctions and discriminations which are abhorrent to the democratic ideals of trial by jury."

We respectfully submit, therefore, that petitioners have been denied the equal protection of the laws because the North Carolina jury selection statutes favor property owners, and prejudice members of the working class, and that petitioners have been denied due process of law because they were tried by a jury from which members of their class were systematically excluded.

III

The Supreme Court of North Carolina erred in holding and decreeing that the petitioners, by filing their Motion to Quash prior to the swearing and impanelling of the jury to try the issues in the Superior Court of Forsyth County, did not invoke the proper procedure in challenging the validity and constitutionality of the practices used by the County and the State Courts in drawing up and selecting the petit juries.

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Petitioner's Motion to Quash properly presented a challenge to the *array*, raising the question of the invalidity and unconstitutionality of the *entire jury panel* because of discrimination and exclusionary practices and Statutory defects. Numerous cases coming to this court from common law jurisdictions have used the same procedure, Hill vs. Texas, 316 U. S. 400; Norris vs. Alabama, 294 U. S. 587; Neal vs. Delaware, 103 U. S. 370.

The State of North Carolina is a common law jurisdiction. (General Statutes of North Carolina, Chapter 4, Section I.).

Furthermore, in State vs. Kirksey, 227 N. C. 445, 447, the Supreme Court of North Carolina, said;

"If defendant had wished to take advantage of his objection to the petit jury and special venire, he should have done so by challenging the array, State vs. Douglas, 63 N. C. 500, and before entering upon the trial of the case".

Likewise, by implication the Supreme Court of North Carolina in the cases of State vs. Peoples, 131 N. C. 784, and State vs. Daniels, 134 N. C. 641, gave its approval to the use of the Motion to Quash in connection with petit juries as well as grand juries.

It is therefore most difficult for the petitioners to follow the reasoning of the Supreme Court of North Carolina in its opinion below where the Court apparently confused a challenge to the *array* with a challenge to the *polls*.

The reservations of the exceptions taken to the rulings on the Motion to Quash and to the Court's Findings

of Fact thereon, with respect to the regular panel, conclusively establishes that the petitioner's objections were taken and entered in a proper form and at the proper time.

The Supreme Court of North Carolina in its opinion in each of these five (5) cases at bar stated that the exceptions relied on in these five cases are the same as those presented in the case of State vs. Koritz, Etal, 227 N. C. 552, and that the exceptions in these five cases are controlled by the rulings in the Koritz case, there tieing all of these six cases up together. If it is intended by the Supreme Court of North Carolina thereby to hold that the petitioners in these five (5) cases were satisfied with or contented with the petit jury drawn from the County box in these five (5) cases, or that petitioner's rights were at any time waived, the same is most vigorously denied on the basis of the exceptions taken, as shown by the record in all of these five cases.

Again it should be noted that in the five (5) cases at bar there was no Order made in the Superior Court of Forsyth County ordering and directing that a special venire of 25 men be summoned by the sheriff and 10 of them, be Negroes, as was done in the Koritz case, (227 N. C. 552). So that, all references in the Koritz case by the Court, that appellant is first required, in challenging the jury poll under a special venire, to exhaust his peremptory challenges and then undertake thereafter to challenge another juror, before he can complain, is not relevant and can have no application to these five (5) cases, although it would seem that the contrary was intended by the court.

Nothing done or omitted to be done by the Petitioner in any way amounted to consent to the court's actions, or waiver or abandonment of petitioner's constitutional rights.

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It is significant that neither in the Koritz case, nor in the five (5) cases at bar, did the Superior Court of Forsyth County, or the State on appeal in the Supreme Court of North Carolina, made any reference whatever to any possible procedural deficiencies in presenting these questions.

The Petitioners are unable to comprehend the precise meaning of the Supreme Court of North Carolina in its discussion of the procedural question since the law of North Carolina was carefully followed in presenting the questions and exceptions were duly noted, and none of petitioner's rights were waived. Petitioner is at a loss to understand what more, if anything, could have been done by them to raise the questions presented to this court, and to preserve their rights in the premises.

In any event, Petitioners submit that considerations of insubstantive technical procedure should not preclude this Court from reviewing serious questions affecting basic and fundamental constitutional rights. Hormel vs. Helvering, 312 U. S. 552, 557, 558.

CONCLUSION

In the light of all of these flagrant discriminatory practices outlined in Petitioner's brief, and amply supported by the record evidence, it is most respectfully urged that no more deserving or appealing cause of violation of the 14th Amendment could be presented.

These poor, humble Negro workers, resting upon harsh and excessive punishments, are entitled, under the law, to have their rights and liberties passed upon by a jury constitutionally composed and devoid of discriminatory practices and imperfections. This they have not had. Deny them this right and the public officials of Forsyth County will be further encouraged to pursue and continue their practices of discrimination which make it

impossible for the poor and lowly of that County to secure a trial by jury which the ends of justice demand and require.

Superficial barriers of technical procedure or vocal denials of discrimination, no matter how cleverly and adroitly planned and carried out, should not by this Court be permitted to obscure a concealed deprivation of fundamental, constitutional rights. As stated by this Court in Smith vs. Texas, 311 U. S. 128, (at p. 132), "If there has been discrimination, whether accomplished ingenuously or ingeniously, the conviction cannot stand".

The injury done in petitioner's cases is not limited to petitioners only, important as that is, but affects seriously other interests as well, namely, (1) The Jury System in North Carolina, (2) the Law as an institution, (3) the Community at large, and (4) the Democratic Ideal of trial by jury.

Wherefore, it is most respectfully submitted that the judgments of the Supreme Court of North Carolina should be reversed.

WM. REID DALTON,
NATHAN WITT,
Attorneys for Petitioners.

APPENDIX

Jury Statutes of North Carolina

Chapter 9, General Statutes of North Carolina, (1943) provides the framework for the selection of jurors.

Section 1 states;

"The Board of County Commissioners for the several counties at their regular meetings on the first Monday in June, in the year 1905, and every two years thereafter, shall cause their clerks to lay before them the tax returns of the preceding year for their county, from which they shall proceed to select the names of all such persons as have paid all the taxes assessed against them for the preceding year and are of good moral character and of sufficient intelligence. A list of the names thus selected shall be made out by the Clerk of the Board of Commissioners and shall constitute the jury list, and shall be preserved as such."

Section 2 provides;

"The Commissioners at their regular meeting on the first Monday in July in the year 1905, and every two years thereafter, shall cause the names on their jury list to be copied on small scrolls of paper of equal size and put into a box procured for that purpose, which must have two divisions marked number one and number two, respectively, and two locks, the key of one to be kept by the sheriff of the county, the other by the chairman of the Board of Commissioners, and the box by the Clerk of the Board."

Section 3 states;

"At least 20 days before each regular or special term of the Superior Court, the Board of Commissioners of the County shall cause to be drawn from the jury box out of the partition marked No. 1, by a child not more than ten years of age, 36 scrolls except when the term of court is for the trial of civil cases exclusively, when they need not draw more than 24 scrolls. The persons whose names are inscribed on said scrolls shall serve as jurors at the term of the Superior Court to be held for the county ensuing such drawing, and for which they are drawn. The scrolls so drawn to make the jury shall be put into the partition marked No. 2. The said Commissioners shall at the same time and in the same manner draw the names of 18 persons who shall be summoned to appear and serve during the second week, and a like number for such succeeding week of the term of said court, unless the judge thereof shall sooner discharge all jurors from further service. The said Commissioners may, at the same time and in the same manner, draw the names of 18 other persons, who shall serve as petit jurors for the week for which they are drawn and summoned. The trial jury which has served during each week shall be discharged by the judge at the close of said week, unless the said jury shall be then actually engaged in the trial of a case, and then they shall not be discharged until the trial is determined."

Section 4, with respect to Forsyth County, provides:

" . . . . the Board of County Commissioners is authorized and empowered to draw as jurors from the box, as provided in the preceding section, an additional number of jurors to those now provided by law . . . . At all

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criminal terms, regular and special, for the first week 42 jurors shall be drawn in their stead."

Section 7 adds:

"If any of the persons drawn to serve as jurors are dead, removed out of the county, or otherwise disqualified to serve as jurors, the scrolls with the names of such persons must be destroyed, and in such cases other persons shall be drawn in their stead."

Section 11 deals with talesmen;

"That there may not be a defect of jurors, the sheriff shall by order of the court summon, from day to day, of the bystanders, others jurors, being freeholders, within the county where the court is held, or the judge may, in his discretion, at the beginning of the term direct the tales jurors to be drawn from jury box used in drawing the petit jury for the term, in the presence of the court; such tales jurors so drawn to be summoned by the sheriff and to serve on the petit jury, and on any day the court may discharge those who have served the preceding day. The judge may, upon his own motion, or upon the request of counsel for either plaintiff or defendant, instruct the sheriff to summons such jurors, outside of the courthouse. It is a disqualification and ground of challenge to any tales juror that such juror has acted in the same court as grand, petit or tales juror within two years next preceding such term of court."

Section 24 provides;

"The judges of the Superior Court, at the terms of their courts, except those terms which are for the trial of civil cases exclusively, and special terms for which no grand jury has been ordered, shall direct the names of

all persons returned as jurors to be written on scrolls of paper and put into a box or hat and drawn out by a child under ten years of age; whereof the first 18 drawn shall be a grand jury for the court; and the residue shall serve as petit jurors for the court."

These provisions constitute the method of jury selection relevant to a consideration of the record in this case.

It may be well to add at this point that the General Statutes of North Carolina (1943), Chapter 105.

Section 341 provides;

"There shall be levied by the Board of County Commissioners in each county a tax of $2.00 on each taxable poll or male person between the ages of 21 and 50 years. . . . ."

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